In the High Court of Punjab and Haryana at Chandigarh.

F.A.O.No.4676 of 2002.

Date of decision:4.9.2006.

M/s Indian Electricity Supply and Transmission Private Limited.

...Appellant.

Versus

Haryana Power Generation Corporation Limited and another.

...Respondents.

...

Coram: Hon'ble Mr. Justice S.N.Aggarwal.

...

Present: Mr.Ashu M. Punchhi Advocate for the appellant.

Mr.S.K.Jain Advocate for the respondents.

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Judgment.

S. N. Aggarwal, J.

This judgment will dispose of FAO No.5737 of 2002 also as both these appeals are directed against the same judgment. For the sake of convenience, facts are taken from FAO No.4676 of 2002.

The Haryana State Electricity Board (in short HSEB) now known as Haryana Power Generation Corporation Limited (respondent No.1) (in short the respondent-Corporation) floated tenders on

9.6.1995 calling for proposals for the completion of 1x210 MW Unit-6 Panipat Thermal Power Project at Panipat,where 4 units of 110 MW and one unit of 210 MW were already in operation. The proposals were to be submitted on or before 3.8.1995. M/s. Indian Electricity Supply and Transmission Private Limited (in short appellant-Company) submitted the proposal and was one of the candidates. The proposal submitted by the appellant-Company was accepted and the Memo of Understanding (in short MoU) was executed between the parties on 11.6.1997, valid for a period of three months. In pursuance thereof, the appellant-Company furnished Bank guarantee to the tune of Rs.50 lacs for a period of 30 months. Foreign collaborator was also to be associated by the appellant-Company. However,the parties processed and negotiated in the matter which continued till December,1998, but with no concrete result. Thereafter, the respondent-Corporation abrogated the MoU dated 11.6.1997. Thereafter the respondent issued notice to the appellant vide letter dated 17.1.2000 for the recovery of Rs.25,31,750/- followed by a reminder dated 21.2.2000. The appellant-Company denied its liability. As a result, the dispute was referred by the respondent-Corporation to the Law Secretary, Government of Haryana (respondent No.2) for arbitration as per clause 14 of the MoU dated 11.6.1997. The appellant also made a counter claim. The Arbitrator vide his award dated 27.4.2001 held the appellant liable to make payment of Rs.25,31,750/- with interest at the rate of 15% per

annum compounded annually with effect from 17.1.2000 to the respondent-Corporation. The respondent-Corporation was also held entitled to forfeit and encash the Bank guarantee of Rs.50 lacs and the counter claim was declined.

In the meantime, the respondent-Corporation was in the process of getting the Bank guarantee encashed on which the appellant filed a petition under Section 9 of the Arbitration and Conciliation Act, 1996 (in short the Act of 1996) in the Court of District Judge, Ambala on 15.5.1999. The said petition was dismissed by the Court of District Judge, Ambala vide order dated 31.5.1999. Thereafter the appellant filed an appeal (FAO No.1358 of 1999) in this Court against the said judgment which is pending consideration in this Court.

After the passing of the award dated 27.4.2001, the appellant filed objection petition under Section 34 of the Act of 1996 which was heard and decided by the Court of Additional District Judge (1), Panchkula vide judgment dated 7.8.2002. Vide this judgment, the learned Additional District Judge, Panchkula held that the respondent-Corporation was entitled to recover a sum of Rs.25,31,750/- and the said amount with interest could be recovered out of the amount of Bank guarantee but it has no right to forfeit the Bank guarantee to the tune of Rs.50 lacs.

Aggrieved against this judgment, the present appeal has been filed by the appellant-Company.

FAO No.5737 of 2002 has been filed by the respondent-Corporation as it was aggrieved against that part of the judgment by which it was held that the respondent-Corporation was not entitled to forfeit the amount of Bank guarantee.

The main submission of learned counsel for the respondent-Corporation was that the appellant-Company had committed the breach of MoU dated 11.6.1997 and,therefore, it was liable to compensate the respondent-Corporation for the expenditure incurred by it in processing the matter amounting to Rs.25,31,750/-. Similarly, the amount of Bank guarantee to the tune of Rs.50 lacs was liable to be forfeited and was encashable by the respondent-Corporation.

On the other hand, the submission of the learned counsel for the appellant-Company was that the MoU failed as the parties could not reach at any agreement and the period of MoU was not extended beyond three months. As a result, the negotiations which were held in this period of three months could not materialise. The appellant-Company was not at fault. Therefore, it was neither liable to pay any amount as expenditure incurred by the respondent-Corporation for seeking advice from M/s. The Industrial Credit and Investment Corporation of India Limited (in short ICICI) or the hostel charges nor the respondent-Corporation was entitled to forfeit the amount of Bank guarantee or encash the same.

These submissions have been considered and the record has

been perused.

The documents referred in this judgment were proved by the parties in the file of the Law Secretary, Government of Haryana, respondent No.2.

To appreciate the submissions advanced before me by the learned counsel for the parties, it would be necessary to examine the relevant and necessary clauses of MoU dated 11.6.1997. These read as under:-

> "7. The HSEB will provide the draft of Power Purchase Agreement (PPA) to the Promoter/JVC by 16th June, 1997. The final PPA will be signed on 15th July, 1997 or on mutually agreed date and the Project will be completed in twenty four (24) months thereafter.
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> . . . . . .
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> 9. This MoU shall remain valid for an initial period of three (3) months. The validity can be extended on mutual agreement.
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> . . . . . .
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> 12. Neither party shall be considered to be in default under this MoU for any breach of any of the terms thereof due to imposition of restrictions or onerous regulations by any Govt. or statutory authority or agency or other cause beyond its reasonable control.

13. Promoter agrees to provide within 30 days of the signing of this MoU a security of Rs.50,00,000/- (Rupees Fifty lacs only) in the shape of irrevocable Bank Guarantee (BG) in favour of the HSEB for carrying out the objectives of this MoU. This BG will remain valid initially for the period of three (3) months and will be extendable if required. This security shall be liable to be forfeited by the HSEB in case of breach by the Promoter/JVC."

After the execution of MoU, the ball was set rolling. The respondent-Corporation was to furnish the Power Purchase Agreement (in short PPA) to the appellant-Company upto 16.6.1997 and under clause 7 of MoU, the final PPA was to be signed on 15.7.1997 or on mutually agreed date. Accordingly, the draft PPA was prepared by the respondent-Corporation with the advice of ICICI. Discussions were held by the respondent-Corporation with the appellant-Company on 4.8.1997 and the draft PPA as well as draft share holders agreement (in short SHA) were handed over to the appellant-Company for its comments. Its reminder was sent on 14.8.1997.(Annexure C-5) by which the next meeting was also scheduled for 22.8.1997 at Panchkula for holding discussion on the draft PPA and draft SHA. But in fact the meeting was held on 27.8.1997 and 28.8.1997 which was attended by the officials of the appellant-Company, respondent-Corporation and of the ICICI (Annexure C-6). It was decided that considering the

discussions held between the parties at the meetings held at Shakti Bhawan and CE(TD) office at Panchkula, ICICI would provide a revised draft of the SHA by 5.9.1997. The appellant-Company was also to furnish written comments on the Site Lease Agreement (in short SLA) by 1.9.1997. They were also to furnish comprehensive comments on the draft PPA latest by 5.9.1997. After the receipt of the comments from the appellant-Company on SLA and PPA, the next meeting was to be fixed in consultation with the ICICI for finalising drafts of SHA, SLA and PPA.

There was also dispute regarding the percentage of equity shares between the appellant-Company,foreign collaborators and the respondent-Corporation. The respondent-Corporation was seeking minimum of 26% stake in the equity capital while the appellant-Company was offering only 20% stake although it also undertook to protect the interests of the respondent-Corporation by making provision in the SHA.

Again the discussion had taken place between the parties on 12.9.1997 and in the said discussion, it was decided to finalise SLA, SHA and PPA by 17.9.1997. That having not been done, the respondent-Corporation sent reminder dated 19.9.1997 to the appellant-Company (Annexure C-7). However, the draft PPA was forwarded by the appellant-Company to the respondent-Corporation on 22.9.1997 but the same was returned by the respondent-Corporation to the appellant-

Company on 23.9.1997 with some objections. Meeting was held on 25.9.1997 between the parties in which it was agreed that the appellant-Company shall furnish comments on SHA and proposed equity structure alongwith explanatory note on or before 29.9.1997. (Annexure C-8).

The appellant-Company sent letter dated 6.9.1997 (Annexure C-9A) to the respondent-Corporation explaining the various steps taken by the appellant-Company in furtherance of MoU dated 11.6.1997 and a prayer was made that the period of MoU be extended by six months. These steps were recounted by the appellant-Company as under:-

> "To implement the said project, IESTL has taken various effective steps, some of them are as under:
>
> a) A company under the name and style of Panipat Power Corporation Pvt. Limited was incorporated with initial authorised capital of Rs.5 Crore within a period of 15 days from the date of MOU.
>
> b) Draft Shareholders Agreement was sent by the company on 4.7.97. A revised draft of Shareholders Agreement was given to us on 4.8.97. Thereafter discussions have taken place on 27/28th August, 1997 at Chandigarh. As per discussions held, a revised draft of Shareholders Agreement is to be submitted by ICICI.

c) We have opened Site Office at Panipat and also deputed two managers on whole-time basis for effective monitoring of the day-to-day activities. We have also taken 8 bachelor accommodation at site.

d) A bank guarantee dated 9th July, 1997 of Rs.50 lac was furnished to the HSEB as per terms of MoU.

e) M/s. ANZ Investment Bank, New York, have been appointed as Financial Advisors to the Project to tie-up the funds for the Project from the Foreign Investors/Lenders.

f) Mott Ewbank Preece, an International Consultant along with Premier Energy Technologies P.Ltd,have been appointed as Owner's Engineering Consultants to the Project.

g) M/s Khaitan & Khaitan, Solicitors and Advocates, have been appointed as Legal Advisors to the Project.

h) We received draft PPA for our comments on 4.8.97. A preliminary discussion on the draft PPA was held on 27/28th of August,1997. The detailed comments on the draft PPA are being compiled for further discussion.

i) Discussion with Fuel Suppliers & Railways are in progress.

Till date, we have already committed Rs.300 Lacs (approx.) towards the said project.

As will appear from the above, the project is making good progress,it will,therefore, be in the interest of parties that the validity of MoU is extended by a period of six months."

The appellant-Company again vide their letter dated 20.10.1997 (Annexure C-9B) requested the respondent-Corporation to extend the MoU by six months i.e. upto March 11,1998 by giving detailed reasons. It would in the fitness of things to reproduce the contents of this letter as well. It reads as under:-

"As you are aware, an MoU between the Government of Haryana, the HSEB and Indian Electricity Supply & Ltd. was established on June 11,1997. This MoU (copy enclosed) was valid upto September 10,1997. Extension of the MoU has been under your consideration.

During our discussion with Chairman-HSEB on the 18th instant at New Delhi we had submitted that MoU may please be extended upto March 10,1998 i.e. by six months for:

1) Providing the requisite comfort level for our foreign investors;

2) Allowing time for completion of pending activities.

We also request you to amend Indian Electricity Supply & Transmission Ltd. (mentioned in our MoU) to read "Indian Electricity Supply & Transmission Pvt. Ltd." in view of the

change effected and noted by the Registrar on September 5,1997 (copy enclosed for your reference).

We look forward to your favourable response and extended validity of MoU upto March 11,1998."

Some further correspondence was exchanged between the parties. The meetings had also taken place between them on 27.10.1997 and 28.10.1997 but the things remained inconclusive. Meeting again took place between the parties on 3.11.1997 (Annexure C-13) in which equity structure was decided. It was also decided that the proposal of the appellant-Company to replace the foreign collaborator shall be examined by the ICICI. It was also decided that the discussion on PPA and SHA would start immediately and would be completed within a week or so and both the documents were to be initialled by the parties latest by 17.11.1997. The process was to be completed by 15.12.1997 and the work at site was to be started on 2.1.1998.

On 2.1.1998, however, the Council of Ministers took the following decision (Annexure C-17):-

"It was explained by the CIP that M/S IESTL, New Delhi have not taken any concrete steps to complete the 6th unit of Panipat Thermal Power Plant even though the MoU was signed on 11.6.97. They are wanting extension upto June,1998. After discussions, it was felt that giving extension to IESTL would only delay the project.

Therefore, HSEB was directed to take up the project in-house and to have negotiations with PFC and BHEL regarding quick implementation of the Project."

It was thereafter that the respondent-Corporation issued notice dated 12.1.1998 (Annexure C-18) informing the appellant-Company that the Government of Haryana has decided not to extend the MoU dated 11.6.1997 entered into with the appellant-Company for completion of 210 MW Unit-6 at Panipat Thermal Power Project. It was for the first time on 17.1.2000 i.e. after 2 years (Annexure C-22) that the respondent-Corporation made a claim demanding an amount of Rs.25,31,750/- with the following break up:-

"1.Expenditure incurred by the erstwhile HSEB (Now HPGCL) on advisory services from M/s ICICI, Mumbai regarding completion of 210 MW Unit-6, PTPP, Panipat through IPP (Annexure -1) Rs.25,18,010.00

2.Balance dues against Field Hostel accommodation charges Rs. 13,740.00

Rs.25,31,750.00

It was followed by a subsequent reminder dated 21.2.2000 (Annexure C-23).

Its liability was specifically denied by the appellant-Company vide their letter dated 6.3.2000 (Annexure C-24) with the following facts:-

"Dear Sir,

This is in reply to your letter dated 17.1.2000. In this connection we state as under:-

1. We deny that the project was abandoned for the reasons stated in your letters under reply. On the contrary HSEB(as it was then) proceeded to cancel the MoU dated 11.6.97 without any valid reasons. The cancellation/termination of MoU dated 11.7.96 is illegal and arbitrary.

2. We deny that we are obliged to pay or reimburse any purported expenditure and in particular the sum of Rs.25,31,750/- allegedly paid by you to ICICI, Bombay and towards any alleged dues against Field Hostel accommodation. The claim is false and bogus.

3. Please also note that any frivolous proceeding or claim which may be made by you, shall be defended by us at your own risk and cost."

From the above narration of events which took place between the parties during the period of MoU dated 11.6.1997 and thereafter , it is clearly made out that the appellant-Company was not

sitting silent after the execution of MoU on 11.6.1997. As per clause 7, the draft PPA was to be provided by the respondent-Corporation to the appellant-Company by 16.6.1997 which was to be signed by 15.7.1997 but the respondent-Corporation was negligent in not handing over the draft PPA as scheduled. But it was handed over only on 4.8.1997. No doubt, the appellant Company also took time in responding. The meetings were held by them amongst themselves on 27.8.1997 and 28.8.1997 but the draft PPA was not finalised. After all, it was project running into more than Rs.600 crores in which foreign collaborators were also to be associated. The period of MoU had expired on 10.9.1997 and till then, nothing tangible had become a ground reality. The parties remained involved in holding discussions and meetings and exchanging correspondence. The appellant-Company in their letter dated 6.9.1997 had clearly narrated the steps taken by it in furtherance of the MoU and requested the respondent-Corporation for extending the period of MoU for another six months for processing the project further.

Although the period of MoU was not extended by the respondent-Corporation but talks were also not terminated after the expiry of 3 months i.e. after 10.9.1997. The appellant-Company had again informed the respondent-Corporation vide their letter dated 20.10.1997 that extension of the period of MoU upto 10.3.1998 was necessary for assuring foreign investors and collaborators for seeking

their cooperation but it was not responded by the respondent-Corporation. Thereafter again the correspondence took place. Meetings were held on 27.10.1997 and 28.10.1997 as well as on 3.11.1997 but the life of MoU was not extended after 10.9.1997.

If the appellant-Company had been negligent in taking appropriate steps required of them, the MoU would have been terminated after its expiry on 10.9.1997 and there was no need for holding further correspondence or meetings and discussions thereafter. If the respondent-Corporation was considering that MoU might materialise into an agreement and for that purpose, they were holding meetings and discussions with the appellant-Company even after the dead line i.e. 10.9.1997, then it was incumbent upon the respondent-Corporation to extend the duration of MoU as prayed for by the appellant-Company,may not be for six months but for a period which the respondent-Corporation should have considered reasonable.

Although further steps were still in the process when a decision was taken by the Council of Ministers on 2.1.1998 for taking the work in its own hands.

The perusal of events discussed above clearly reveals that both the parties are equally to be blamed for non-materialisation of the project within the period of MoU dated 11.6.1997. If both the parties had been keen, the progress of negotiations could have taken place on day to day basis. But at the same time since the amount involved is

very huge, therefore, each party was more conscious in safeguarding its own interests. Therefore, none can be held responsible for materialising the MoU dated 11.6.1997 into an agreement. Therefore, none of the parties is entitled to recover any amount from the other.

Therefore, the Arbitrator has gone wrong in holding the appellant-Company liable for committing breach of MoU dated 11.6.1997 and for forfeiting the Bank guarantee. The learned trial Court has rightly held that respondent-Corporation was not entitled to forfeit the amount of Bank guarantee. As per clause 13 of the MoU dated 11.6.1997, the Bank guarantee was the security amount and the security was liable to be forfeited in case of breach by the appellant-Company. Since breach has not been proved, therefore, the learned trial Court has rightly held that the amount of Bank guarantee was not liable to be forfeited. That finding of the learned trial Court is up-held and the appeal filed by the respondent-Corporation (FAO No.5737 of 2002) is liable to be dismissed.

The respondent-Corporation is claiming an amount of Rs.25,18,010/- as the expenditure incurred by the respondent-Corporation on advisory services from ICICI Mumbai regarding completion of 210 MW Unit-6, PTPP, Panipat through IPP. It was for the respondent-Corporation to avail the services of ICICI or not to do so. The services of ICICI were not availed by the respondent-Corporation at the asking of the appellant-Company nor it was one of

the conditions of MoU that the expenditure incurred on advisory services rendered by ICICI were to be borne by the appellant-Company. Therefore, the respondent-Corporation has no right to recover the expenditure incurred on the advisory services rendered by ICICI to the respondent-Corporation. Moreover, the respondent-Corporation had started spending on ICICI even before the execution of MoU on 11.6.1997 i.e. when the appellant-Company was associated in this project. Similarly, the amount spent in Field Hostel accommodation to the tune of Rs.13,740/- was not recoverable from the appellant-Company as it was neither a condition in the MoU nor the appellant-Company had asked the respondent-Corporation to hire hostel accommodation for its own officers. The demand made by the respondent-Corporation from the appellant-Company is totally misconceived and the learned trial Court has gone wrong in rejecting the objections of the appellant-Company on that aspect.

Since the demand raised by the respondent-Corporation is totally baseless and misconceived, therefore, the appeal filed by the appellant-Company (FAO No.4676 of 2002) deserves to succeed.

As a result of the discussion held above, FAO No.4676 of 2002 is accepted and the award passed by the Arbitrator as well as objection petition by which the claim of respondent-Corporation for recovery an amount of Rs.25,31,750/- has been up-held are set aside. FAO No.5737 of 2002 is dismissed. The respondent-Corporation shall

refund the papers of Bank guarantee as uncashed to the appellant-Company within a fortnight after the receipt of a copy of judgment.

September 4 ,2006. (S. N. Aggarwal)
Jaggi Judge